IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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Nos. 800 and 969

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WORLD AIRWAYS, INC., ET AL., *Petitioners*,

v.

PAN AMERICAN WORLD AIRWAYS, INC., ET AL.

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AMERICAN SOCIETY OF TRAVEL AGENTS, INC., *Petitioner*,

v.

PAN AMERICAN WORLD AIRWAYS, INC., ET AL.

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**On Writs of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITION FOR REHEARING

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WORLD AIRWAYS, INC., TRANS INTERNATIONAL AIRWAYS, INC., SATURN AIRWAYS, INC., CAPITOL INTERNATIONAL AIRWAYS, INC., AMERICAN FLYERS AIRLINE CORP., PURDUE AERONAUTICS CORP., and AMERICAN SOCIETY OF TRAVEL AGENTS, INC., petitioners in the above-entitled consolidated causes, respectfully pray the Court to grant a rehearing.

I

Affirmance of the judgment herein by an equally divided Court, while binding upon the parties in this controversy if left undisturbed, is of course not an authoritative determination for other cases. E.g., *United States* v. *Pink*, 315 U.S. 203, 216; *Hertz* v. *Woodman*, 218 U.S. 203, 213-214. Consequently it continues an existing conflict between circuits that will predictably soon be resubmitted here and that Congress is far from certain to resolve legislatively in the immediate future.

*First.* There are now pending in the Second Circuit two other proceedings that raise once again the question whether the term "charter trips in air transportation" (§ 101(33) of the Federal Aviation Act; 49 U.S.C. § 1301(33); Pet. Br. 59) is broad enough to encompass inclusive tour charters. *Trans World Airlines et al.* v. *Civil Aeronautics Board*, Nos. 31901 and 31902. The Board has moved in those cases for the entry of adverse judgments and for a stay of mandate, representing that the Solicitor General will then seek certiorari.

The pending *Trans World Airlines* cases and the earlier District of Columbia Circuit case all involved domestic inclusive tour charters, while the present litigation concerns international inclusive tour charters; but, as all parties are agreed, the domestic as well as the international situations turn on the interpretation of precisely the same statutory provision.*

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* Indeed, *non constat* the ruling below (1129a-1131a), the present case involves a classic example of collateral estoppel under the rule of, e.g., *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U.S. 89.

*Second.* Immediately following the decision herein, bills were introduced in both branches of Congress to overcome the effect of this Court's affirmance without opinion.

S. 3566 and H.R. 17685, 90th Cong., 2d sess., introduced on May 29 and June 5, 1968, respectively, would specifically authorize the Board to validate inclusive tour trips of the kind held valid by the District of Columbia Circuit in *American Airlines* v. *CAB,* 365 F. 2d 939, but rejected by the Second Circuit (and by this Court on equal division) in the present case.

If either of these bills were enacted, inclusive tour charters would be validated, and the present judicial conflict would be resolved—as indeed it would be if Congress were to enact legislation directed in the opposite direction, specifically forbidding such charters.

But neither the present litigants nor this Court can have assurance that any legislation settling the problem will be promptly enacted. Hearings on S. 3566 were scheduled for June 12, 1968, but no House hearings had been set when this petition went to press. Consequently the present conflict of circuits will continue as long as this Court remains equally divided over the scope of administrative flexibility and discretion open to the Civil Aeronautics Board in its implementation and regulation of the statutory grant that authorizes "charter trips in air transportation."

Moreover, if the existing conflict is ultimately resolved favorably to the supplemental carriers in the domestic inclusive tour cases now pending in the Second Circuit, but the present affirmance in the international inclusive tour cases is permitted to become

final before legislation is enacted, then the latter issues must once again be heard by the Board in a certificate proceeding and approved by the President—a process that will undoubtedly and indeed inevitably consume several years.

## II

We venture to suggest that the basic issue of statutory construction herein is actually less opaque than it may have appeared, particularly since it can be expounded in virtually syllogistic terms:

1. In the course of the Committee hearings, the trunk lines (respondents here) objected to a legislative definition of "charter," while the supplementals (the present petitioners in No. 800) urged that the Congress define "charter." Full references are at Pet. Br. 6-10.

2. The Senate version of the bill that became the Act of July 10, 1962, P. L. 87-528, 76 Stat. 143, the measure now in question, acceded to the supplementals' urging and included a legislative definition of "charter." Full references here are at Pet. Br. 10-13. The House version, however, reflected the preferences of the trunk lines, the House Committee concluding "that under the circumstances, authority to define charter services should be left, as at present, with the Board, subject to the limitations contained in the reported bill. This is a very difficult subject and any effort to freeze a definition of charter service into law could well lead to complications." (Pet. Br. 13-14).

3. Consequently, when the Senate receded in the Conference Report (Pet. Br. 15-17), it was receding, not from a grant of authority to the Board to define

"charter" as including tours—up to the time of final enactment in 1962, as the committee hearings show, there was never the slightest doubt anywhere of the Board's authority in that regard. To the contrary, the Senate receded from its legislative definition of "charter," and concurred with the House view that "authority to define charter services should be left, as at present, with the Board."

Once the earlier legislative history is thus objectively read, that is the only admissible meaning of the Conference Report.

4. What was thereafter said when the Conference Report was under consideration, comments at variance alike with that Report, with its background, and with what the Senate Chairman of the Conference Committee told the Senate (Pet. Br. 17-18), cannot, we submit, serve to modify the Conference Report—essentially because unequivocal conference reports are entitled, at the very least, to the protection of a parol evidence rule. See *United States* v. *O'Brien,* Nos. 232 and 233, this Term, decided May 27, 1968, pp. 17-18 of slip opinion.

## III

As matters now stand, the air transportation industry faces a continuing conflict of circuits without any assurance of speedy legislative resolution: Inclusive tour charters are valid in domestic travel but unauthorized in international travel, a distinction quite without the slightest statutory support. This Court will once more be squarely faced with the precise conflict of circuits once the pending *Trans World Airlines* cases are decided by the Second Circuit in accord with that

tribunal's earlier ruling below in the present case, as the Board has requested in order to hasten ultimate determination. Meanwhile, foreign supplemental air carriers are able to operate inclusive tour charters in this country (Pet. Br. 53-54), while American supplemental carriers are precluded from operating similar charters abroad. And, while the present uncertainty continues, several thousand American citizens who have made vacation plans and have purchased tickets from tour operators on the strength of existing Statements of Authorization will be gravely inconvenienced.

All of these considerations unite in urging that next Fall, with nearly a full Term available for further study and deliberation, this Court should make another effort to resolve the present impasse.

Accordingly, we respectfully submit that this petition for rehearing should be granted.

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**Certificate of Counsel**

I certify that this petition is presented in good faith and not for delay.

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JUNE 1968.